

New Jersey Department of Environmental Protection  
New Jersey Administrative Code  
Title 7, Chapter 1E

Subchapter 8

**Confidentiality Determinations**

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**7:1E-8.1 Time for making confidentiality determinations**

(a) The Department shall make a confidentiality determination:

1. If the Department receives a request, by a person to whom the Department is restricted from disclosing confidential information pursuant to N.J.A.C. 7:1E-10, to inspect or copy records containing assertedly confidential information which is the subject of a confidentiality claim; or

2. Before taking any action which is inconsistent with the requirements for treatment of confidential information set forth in N.J.A.C. 7:1E-10.

(b) The Department may, in its discretion, make a confidentiality determination at any time.

**7:1E-8.2 Notice of initial confidentiality determination, and of requirement to submit substantiation of claim**

(a) If the Department initially determines that any of the assertedly confidential information may be confidential information, the Department shall:

1. Notify each claimant who is known to have asserted a claim applicable to such information, and who has not previously been furnished with notice with regard to the information in question, of the following:

- i. That the Department is in the process of making a confidentiality determination with respect to the claimant's claim;
- ii. That the claimant is required to substantiate the claim as required by N.J.A.C. 7:1E-8.3;
- iii. The address of the office to which the claimant's substantiation must be addressed;
- iv. The time allowed for submission of substantiation, pursuant to N.J.A.C. 7:1E-8.4;
- v. The method for requesting a time extension under N.J.A.C. 7:1E-8.4(b); and
- vi. That a claimant's failure to furnish substantiation within the time allocated in N.J.A.C. 7:1E-8.4 shall operate as a waiver of the claimant's claim.

2. Furnish, to any requester whose request for inspection or copying of the information is pending, notice that:

- i. The information which is the subject of the request may be confidential information;
- ii. The Department must undertake further inquiry before granting or denying the requester's request; and
- iii. After the Department has made a confidentiality determination concerning the information which is the subject of the request, the Department will grant or deny the request.

(b) The Department shall send the notice required by paragraphs (a)1 and 2 by certified mail, return receipt requested, or by other means providing a receipt for delivery.

(c) If the Department is able to determine whether all of the assertedly confidential information is or is not confidential information, without the need for submission of substantiation under N.J.A.C. 7:1E-8.3, such determination shall have the effect of a final confidentiality determination pursuant to N.J.A.C. 7:1E-8.5. The Department shall provide such notices of the determination as are required by N.J.A.C. 7:1E-8.5.

### **7:1E-8.3 Substantiation of confidentiality claims**

(a) If the Department has determined that any assertedly confidential information may be confidential information, and notified the claimant pursuant to N.J.A.C. 7:1E-8.2(a) and (b), the claimant shall substantiate the confidentiality claim by submitting information to the Department in the following areas within the time allotted in N.J.A.C. 7:1E-8.4:

1. Measures taken by the claimant to prevent disclosure of the information to others, including evidence that the information is not contained in materials which are routinely available to the general public, including without limitation initial and final orders in contested case adjudications, press releases, copies of speeches, pamphlets and educational materials;

2. The extent to which the information has been disclosed to others and whether it was disclosed to other persons either by the claimant (except in a manner which protects the confidentiality of the information) or without the consent of the claimant (other than by subpoena or by discovery based on a showing of special need in a judicial proceeding, arbitration, or other proceeding in which the claimant was required to disclose the information to such other persons, as long as the information has not become available to persons not involved in the proceeding), and the precautions taken to prevent further disclosure;

3. If the Department, EPA or any other agency has previously made a confidentiality determination relevant to the pending confidentiality claim, copies of all such confidentiality determinations;

4. A description of any substantial harmful effects which disclosure would have upon the claimant's competitive position or national security, an explanation of why such harmful effects are substantial, and an explanation of the causal relationship between disclosure and such harmful effects;

5. Evidence that no law, regulation (including, without limitation, N.J.A.C. 7:1E-8.10 or any other regulations of the Department), or order by a court or other tribunal of competent jurisdiction specifically requires disclosure of the information or provides that the information is not confidential information;

6. The period of time for which the claimant desires that the Department treat the assertedly confidential information as confidential information; and

7. Any other substantiation which is relevant in establishing that the assertedly confidential information is confidential information.

(b) The claimant may assert a confidentiality claim for any information submitted to the Department by the claimant as part of his or her substantiation pursuant to this subsection. If the claimant fails to assert a confidentiality claim for such information at the time of submission, the claimant shall be deemed to have waived all such claims with respect to the information.

#### **7:1E-8.4 Time for submission of substantiation**

(a) The claimant shall submit substantiation within 30 days after the date of the claimant's receipt of the written notice provided under N.J.A.C. 7:1E-8.2(a)1.

(b) The Department may, in its discretion, extend the time allotted for submission of substantiation pursuant to (a) above if, before the expiration of the allotted time, the claimant submits a written request for the extension of such allotted time, provided, however, that except in extraordinary circumstances, the Department shall not approve such an extension of time in connection with a request to inspect or copy assertedly confidential information pursuant to N.J.S.A. 47:1A-1 et seq. without the consent of any person whose request to inspect or copy the allegedly confidential information under N.J.S.A. 47:1A-1 et seq. is pending.

(c) If a claimant fails to submit substantiation within the time allotted pursuant to this section, the claimant shall be deemed to have waived all confidentiality claims with respect to the information for which the substantiation was required.

#### **7:1E-8.5 Final confidentiality determination**

(a) If, after review of the all information submitted pursuant to N.J.A.C. 7:1E-8.2 and 8.3, the Department determines that the assertedly confidential information is not confidential information, the Department shall take the following actions:

1. The Department shall so notify the claimant by certified mail, return receipt requested. The notice shall state the basis for the determination, that it constitutes final agency action concerning the confidentiality claim, and that the Department shall make the information available to the public on the 14th day following receipt by the claimant of the written notice. The notice shall include a copy of the final public copy to be made available to the public.

2. On or after the 14th day following receipt by the claimant of the written notice required by (a)1 above, the Department shall send written notice of the determination to any requester with a pending request to inspect or copy the information which was the subject of the confidentiality claim. The Department shall send the notice by certified mail, return receipt requested.

(b) If, after review of the substantiation submitted pursuant to N.J.A.C. 7:1E-8.3, the Department determines that the assertedly confidential information is confidential information, the Department shall treat such information as confidential information in accordance with N.J.A.C. 7:1E-10. The Department shall send written notice of the determination to the claimant and to any requester with a pending request to inspect or copy the information which was the subject of the confidentiality claim. The notice shall state the basis for the determination and that it constitutes final agency action. The Department shall send the notice by certified mail, return receipt requested.

#### **7:1E-8.6 Treatment of information pending confidentiality determination**

The Department shall treat assertedly confidential information as confidential information, until the Department has made a final determination that the assertedly confidential information is not confidential information.

#### **7:1E-8.7 Availability of information to the public after determination that information is not confidential**

If the Department determines that assertedly confidential information is not confidential information pursuant to N.J.A.C. 7:1E-8.5(a), the Department may disclose such information to any person on the date which is 14 days after the claimant's receipt of the written notice of the confidentiality determination.

#### **7:1E-8.8 Preparation of final public copy**

After the Department makes a final confidentiality determination that a record contains confidential information, the Department shall prepare a final public copy of the record based upon the final confidentiality determination. The Department may disclose the final public copy to any person, without restriction or limitation.

#### **7:1E-8.9 Class confidentiality determinations**

(a) The Department may make a class confidentiality determination if the Department finds that the items of information within the class share one or more characteristics, which characteristics would cause the Department to determine consistently that such information is or is not confidential information.

(b) A class confidentiality determination shall clearly identify the class of information to which it applies. Such identification shall include a list of the common characteristics shared by all information within the class.

(c) A class confidentiality determination shall state that all of the information in the class is or is not confidential information.

#### **7:1E-8.10 Classes of information which are not confidential information**

(a) Without limiting the ability of the Department to determine that information not listed in this section is not confidential information, the following types of information are not confidential information:

1. The name, address and business telephone number of the owner or operator of a transmission pipeline, or of the registered agent of such owner or operator;
2. The name, address and business telephone number of a facility and of its owner or operator and the registered agent of such owner or operator;

3. Schedules of integrity testing for aboveground storage tanks required to be submitted under N.J.A.C. 7:1E-2.2(a)4, and information concerning the methods of testing;
4. Test reports for aboveground storage tanks required to be submitted under N.J.A.C. 7:1E-2.2.(a)5;
5. Information contained in documentation of employee training, evaluation and qualifying activities required to be maintained under N.J.A.C. 7:1E-2.12(d);
6. The storage capacity of a facility, the transfer capacity of a facility, and the types of hazardous substances present at a facility;
7. Discharge cleanup information required to be submitted under N.J.A.C. 7:1E-3.4;
8. Lists of standard operating procedures required to be submitted under N.J.A.C. 7:1E-4.2(d)10;
9. Information concerning procedures for mobilizing equipment in the event of a discharge;
10. Names and titles of response coordinators and other persons authorized to hire contractors and release funds for discharge response, containment, cleanup and removal;
11. Information concerning proposed methods of disposal of material gathered during cleanups;
12. Housekeeping and maintenance records required to be made available under N.J.A.C. 7:1E-4.2(f)6;
13. The locations of environmentally sensitive areas;
14. Certifications required under N.J.A.C. 7:1E-4.11, and the identity of any person signing such a certification;
15. Information which the Department is required to report under N.J.A.C. 7:1E-5.9; and
16. Information contained in an administrative order or notice of civil administrative penalty assessment under N.J.A.C. 7:1E-6.3.